PESTICIDE-COATED SEED REGULATION AND EPA FINAL AGENCY ACTION

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In January, a number of commercial beekeepers, growers and environmental activist groups filed a lawsuit – *Anderson et al. v. McCarthy et al.* – against the Environmental Protection Agency (EPA) for failing to properly regulate certain pesticide-coated seeds affecting bees and other wildlife.-

The lawsuit alleged that the EPA incorrectly applied the treated article exemption of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) to the pesticide-coated seeds, enabling the coated seeds to sidestep existing regulation.- Plaintiffs further alleged that a 2013 informal guidance document released by the EPA – which purportedly serves as evidence of the improper regulatory policy – constituted a final agency action, thus providing the basis for the present lawsuit.

On September 30, 2016, a coalition of agricultural industry trade groups joined the EPA and filed a separate motion for summary judgment, alleging that the 2013 guidance document was not a final agency action and that the plaintiffs therefore have no grounds to sue.-

Neonicotinoid Pesticide Issues

Plaintiffs allege that the EPA incorrectly applied the "treated article" exemption for neonicotinoid (neonic) pesticide-coated seeds, given the weight of evidence.

The treated article exemption allows treated seeds to be exempt from FIFRA regulation if: 1) the seeds are treated with a pesticide; 2) the pesticide is intended to protect the seeds; and 3) the pesticide is registered for such use.

One of the many issues – according to plaintiffs – is that the neonic-treated seeds are not being regulated as pesticides under FIFRA.- In their complaint, plaintiffs specifically argued against each of the necessary elements for treated article exemption under FIFRA.

Plaintiffs also argue that application of the treated article exemption was improper in light of: a) the actions of the Fish and Wildlife Service (FWS) in regulating neonic-treated seeds; and b) the Ninth Circuit decision in *Pollinator Stewardship Council et al. v. EPA* retracting the unconditional registration of a wholly different pesticide – sulfoxaflor – that was also found to have negative effects on bees and other wildlife.

According to defendants, however, the decisions of the FWS with regard to neonic-treated seeds are not only unsupported by existing scientific evidence, but the EPA is not required to consider the actions of the FWS when determining whether to apply the FIFRA treated article exemption.- Defendants further argue that the decision of the Ninth Circuit in *Pollinator Stewardship Council* is unrelated and inapplicable, as it specifically related to sulfoxaflor – which is not a neonic pesticide, nor was it registered for use by the EPA as with the neonic pesticides at-issue in the present case.

Final Agency Action

Under section 704 of the Administrative Procedure Act (APA), for a federal court to exercise judicial review over an agency action, it must qualify as a “final agency action.”- Agencies such as the EPA are permitted to take “agency action” at their discretion without being subject to judicial review, so long as that action taken by the agency is not final.

In the present case, plaintiffs allege that a 2013 informal guidance document published by the EPA – following a period of public engagement – qualified as a final agency action.- According to plaintiffs, the document fails to regulate neonic-coated seeds (which, plaintiffs argue, is required under FIFRA).

The EPA’s supposed “failure” to regulate neonic-coated seeds depends entirely on whether the court agrees with the plaintiffs’ assertion that the treated article exemption does not apply to neonic-coated seeds.

Though the EPA’s earlier request to dismiss was denied, it is not clear whether the defendants’ separate and recently-filed motions for summary judgment will be granted.- The EPA argues that the 2013 guidance document did not attach a blanket treated article exemption to neonic-coated seeds, and in fact, the EPA claims that there are no statements in the 2013 document wherein the agency claimed that all treated seeds would be exempt from FIFRA regulation, pending further investigation.

If the court finds the EPA’s argument convincing – that the 2013 guidance document published by the EPA did not set out final rules as to whether treated seeds would be exempt from FIFRA regulation – then it seems likely that summary judgment will be granted.

If the court does not grant summary judgment, then the case will move forward, but it would appear that the plaintiffs’ overall case is somewhat fragile.- Plaintiffs will have to show that the FIFRA treated article exemption clearly does not apply to treated seeds, which does not seem an obvious conclusion given the facts.

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